RECORD AND BRIEFS

No. 16-1276

Supreme Court, U.S.
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In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* LIME ENERGY SERVICES COMPANY AND PRESTIGE CRUISES INTERNATIONAL IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Lime Energy Services Company ("Lime Energy") and Prestige Cruises International ("Prestige Cruises") respectfully submit this brief as *amici curiae* in support of Petitioner Digital Realty Trust, Inc. ("Digital").

Lime Energy is a national provider of energy savings to utility clients under Small Business Direct Install (SBDI) programs. It has a 25-year track record in providing energy efficiency projects to thousands of small business customers annually, completing over 100,000 of such projects for small and mid-sized businesses across the nation since 2009, and helping small and mid-sized businesses gain access to over $272 million in utility incentives.

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, their counsel, *amicus* Lime Energy's insurance carrier, Chubb (providing defense costs to Lime Energy through a policy of insurance), and *amicus* Prestige Cruises' insurance carrier, AIG (providing defense costs to Prestige Cruises through a policy of insurance), made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief. Both Petitioner and Respondent have filed a blanket consent with this Court to the filing of all *amicus* briefs.

Lime Energy is also an employer and the defendant in a case before the United States District Court for the District of New Jersey which considered the very issue before the Court in this case. *See Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *13-14 (D.N.J. Aug. 13, 2015). In *Dressler*, plaintiff Wendy Dressler was a former employee of Lime Energy who alleges she voiced concerns internally about discrepancies in accounts receivable but who did not go to the SEC. After she was terminated, Dressler filed a complaint, alleging retaliatory termination in violation of the whistleblower-protection provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), 15 U.S.C. § 78u-6, *et seq.*[2]

Lime Energy moved to dismiss, arguing Dressler did not qualify as a "whistleblower" under the Dodd-Frank Act's anti-retaliation provision because she did not make required protected disclosures to the SEC. The district court denied the motion to dismiss, holding that the whistleblower protections of the Dodd-Frank

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[2] The whistleblower-protection provisions of the Dodd-Frank Act, Pub. L. No. 111-203, Title IX, § 922(a), 124 Stat. 1376, 1841 (2010), added section 21F to the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78u-6.

Act are ambiguous under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and deferred to the rule promulgated by the SEC (Rule 21F-2(b)(1)) as a reasonable and permissible construction of the Dodd-Frank Act. *See* 2015 U.S. Dist. LEXIS 106532, at *37-43. The parties were in the midst of extensive discovery, but the district court has stayed proceedings pending this Court's decision in this case. Accordingly, resolution of the question presented in this case will have a direct impact on the outcome of *Dressler v. Lime Energy*.

Prestige Cruises, together with its subsidiaries, operates cruise ships under the Oceania Cruises and Regent Seven Seas Cruises brands in the upper premium and luxury segments. It operates cruise ships with destinations to Scandinavia, Russia, Alaska, the Caribbean, Panama Canal, South America, Europe, the Mediterranean, the Greek Isles, Africa, India, Asia, Canada and New England, Tahiti and the South Pacific, Australia, and New Zealand. The company was founded in 2007 and is headquartered in Miami, Florida. Prestige Cruises International, Inc. operates as a subsidiary of Norwegian Cruise Line Holdings Ltd.

Prestige Cruises is also an employer and was the defendant in a case before the United

States District Court for the Southern District of Florida which ruled in favor of Prestige Cruises and other related defendants on the same issue before the Court in this case. *See Duke v. Prestige Cruises Int'l*, No. 14-23017-CIV-KING, 2015 U.S. Dist. LEXIS 107181, at *9-11 (S.D. Fla. Aug. 14, 2015). In *Duke*, plaintiff ("Duke") was a former employee of Prestige Cruise Holdings, Inc. ("Prestige Holdings"), a wholly-owned subsidiary of Prestige Cruises, who alleged he internally reported a fraud allegedly perpetrated by Prestige Holdings, but did not report the alleged fraud to the SEC. Duke was later terminated and claimed it was the result of his alleged report and investigation into the alleged fraud. He filed a complaint claiming retaliatory termination in violation of the Dodd-Frank Act, the Florida Private Sector Whistleblower Act, FLA. STAT. § 448.102(3) (2013) (the "FWA"), and section 806 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").

Prestige Cruises, Prestige Holdings, and other defendants moved to dismiss the complaint in part. They argued that Duke's Dodd-Frank Act claim failed because he was not a "whistleblower" within the meaning of the statute inasmuch as he made no reports to the SEC concerning alleged illegal activity. The district court ultimately dismissed the entire complaint

with prejudice. As to the claim under the Dodd-Frank Act, the district court noted Duke did not allege that he provided any information to the SEC during the investigation and dismissed the claim with prejudice to the extent it relied solely upon his involvement with an internal investigation.

Duke appealed the dismissal to the Eleventh Circuit, arguing that his internal reports were sufficient to invoke whistleblower protection under the Dodd-Frank Act. *See Duke v. Prestige Cruises Int'l*, No. 16-15426-G, Appellant's Br. 18-21 (11th Cir. Nov. 17, 2016). Briefing is not complete in the appeal, and while oral argument had been scheduled for September 20, 2017, the Eleventh Circuit has now stayed the proceedings pending this Court's decision in this case. *Id.*, Order (11th Cir. Aug. 23, 2017).

The question presented is an issue of vital concern to the country's business community. The Dodd-Frank Act's anti-retaliation provision has a statute of limitations of 6-10 years. Unless this Court reverses the decision below, many entities will remain vulnerable to Dodd-Frank whistleblower claims brought by a former employee long separated from the company—like the one Lime Energy currently faces and the one Prestige Cruises will face if the Eleventh Circuit

reverses the district court's Dodd-Frank holding on appeal.

SUMMARY OF ARGUMENT

Lime Energy and Prestige Cruises, as the undersigned *amici*, urge this Court to reverse the decision below. First, the purpose of this brief is to stress that if any employee is not considered a "whistleblower" under the Dodd-Frank Act because the employee allegedly complained internally, but not to the SEC, the employee would not be left without a remedy. In addition to the Sarbanes-Oxley Act, there are multiple alternative remedies available to such an employee, including state statutes and common-law wrongful discharge actions based on violation of public policy. That this is so is exemplified by the *Duke* case: Duke asserted Sarbanes-Oxley and state law claims in addition to his Dodd-Frank claim. The availability of these alternate remedies undercuts any need to expand the Dodd-Frank definition of "whistleblower" beyond the clear statutory language.

Second, the predicament faced by Lime Energy and Prestige Cruises (if the Eleventh Circuit reverses the district court's Dodd-Frank holding on appeal) serves as a concrete example of the problems created by the decision below. In *Dressler*, as in this case, the plaintiff alleged-

ly raised concerns internally about alleged misconduct but admittedly never reported those concerns to the SEC. Nevertheless, after Dressler was terminated, she sued two years later in federal court under the Dodd-Frank Act. Like Respondent in this case, the basis of Dressler's Dodd-Frank Act claim was that she engaged in protected activity under Sarbanes-Oxley and is therefore covered under section 78u-6(h)(1)(A)(iii) of the Dodd-Frank Act. *See Dressler v. Lime Energy*, No. 3:14-cv-07060, Docket Entry ("DE") 1, Compl. ¶¶ 51-56 (D.N.J. Nov. 10, 2014). The district court denied Lime Energy's motion to dismiss and held that Dressler qualified as a "whistleblower" under the Dodd-Frank Act, that the retaliation provision of the Dodd-Frank Act is ambiguous, and accorded *Chevron* deference to the SEC's regulation, which took the position that internal complaints are sufficient to qualify a plaintiff as a Dodd-Frank "whistleblower." As noted, the parties were in the midst of extensive discovery, but the district court stayed proceedings pending this Court's decision in this case.

Absent the district court's denial of Lime Energy's motion to dismiss holding that Dressler qualified as a Dodd-Frank whistleblower, Dressler's lawsuit would have been time-barred due to the differences between the statute of

limitations contained in the Dodd-Frank Act under which she sued (between six and ten years) and the Sarbanes-Oxley Act under which she claims she engaged in whistle-blowing activity (six months). The *Dressler* case thus serves as an object lesson in how dilatory, opportunistic plaintiffs are incentivized by the decision below and decisions like it.

Likewise, if the Eleventh Circuit reverses the dismissal of Duke's Dodd-Frank claim in *Duke v. Prestige Cruises International*, Prestige Cruises will face the same predicament currently faced by Lime Energy in *Dressler*. Like Respondent in this case, the basis of Duke's Dodd-Frank claim was that he is entitled to protection as a whistleblower because he engaged in protected activity under Sarbanes-Oxley, notwithstanding his failure to report the allegations of wrongdoing to the SEC. *See Duke v. Prestige Cruises Int'l*, No. 14-23017-CIV-KING, DE7, Am. Compl. 21 (S.D. Fla. Nov. 24, 2014). Even though the district court dismissed Duke's Dodd-Frank claim, Duke also was able to raise claims under Sarbanes-Oxley and the FWA. *See id.* at 18-21, 22. The FWA claims currently remain pending in Florida state court, where they are being actively litigated. *See Duke v. Prestige Cruise Servs., LLC*, No. 16-020729-CA-01 (Fla. 11th Cir. Ct.).

For these reasons, as well as the reasons discussed by Petitioner and fellow *amici*, the Court should reverse the decision of the court below.

ARGUMENT

I. The Court Should Reject Respondent's Attempt To Expand the Dodd-Frank Definition of "Whistleblower" in Light of the Other Protections Available to Employees Who Complain Internally.

If the Court were to agree with Petitioner and adhere to the plain language of the Dodd-Frank Act's definition of "whistleblower," which requires an external complaint to the SEC, those employees who complained only internally still have a remedy under both the Sarbanes-Oxley Act and an assortment of state statutes and common-law remedies, as the *Duke* case makes clear.

The Sarbanes-Oxley Act reflects a conscious choice by Congress to permit additional protections to whistleblowers who bring to light fraud perpetrated by publicly traded companies, including those whistleblowers who only report internally. Sarbanes-Oxley provides a remedy for an employee or even an independent contractor of a covered issuer of securities to seek relief

for purported retaliation. *See* Br. of *Amicus Curiae* Ctr. for Workplace Compliance 27-28. Indeed, in *Duke v. Prestige Cruises Int'l*, Duke alleged that the Sarbanes-Oxley Act was an alternative basis for imposing liability upon Prestige. Dodd-Frank never was intended to be the only available remedy for internal-only whistleblowers (or even a remedy at all), and the plain language of Dodd-Frank—a reflection of a conscious choice by Congress—makes that intent clear. *See* Pet. Br. 16-18. Respondent likewise ignores the potent protections available under state law whistleblower statutes, such as the state law claim raised in *Duke*.

The very existence of Duke's other federal and state law claims illustrates that terminated employees who complain internally have remedies that do not require interpreting the whistleblower protections of Dodd-Frank in a way that is contrary to the statute's plain, unambiguous language. In the federal action, Duke asserted Sarbanes-Oxley and FWA claims against Prestige Holdings and other defendants based on the same allegations of his termination for internally bringing an alleged fraud to light. *See Duke v. Prestige Cruises Int'l*, No. 14-23017-civ-KING, DE7, Am. Compl. 18-21, 22 (S.D. Fla. Nov. 24, 2014). The district court ultimately dismissed the Sarbanes-Oxley claims

with prejudice because the defendants in question were not entities covered under the statute. *Duke*, 2015 U.S. Dist. LEXIS 107181, at *10-11. However, the court declined to exercise jurisdiction over the remaining state law FWA claim. *Duke*, No. 14-23017-civ-KING, DE63, Final Ord. of Dismissal 6 (July 13, 2016).

Duke's FWA claim is currently proceeding in Florida state court. *See Duke v. Prestige Cruise Servs., LLC*, No. 16-020729-CA-01 (Fla. 11th Cir. Ct.). There, Duke contends, in the same manner as in the federal court action, that he was retaliated against following an internal report and his participation in an internal investigation related to alleged fraud. *See id.*, Am. Compl. ¶¶ 13-18 (Nov. 23, 2016). The dismissal of his Dodd-Frank claim has had no impact on his ability to seek relief under the FWA. In fact, while the state court originally stayed that action pending the resolution of the federal appeal, *see id.*, Ord. Granting Defs.' Mot. to Stay (Dec. 7, 2016), it recently lifted the stay, and the case is proceeding notwithstanding the appeal. *See id.*, Ord. on Defs.' Mot. to Stay (June 9, 2017). Notwithstanding any failure to properly plead his allegations, and even though the federal district court determined Duke does not have the right to seek a remedy under Dodd-Frank, he can and is seeking relief under the

FWA, assuming he meets the independent requirements of that statute.

One of the virtues of state statutory remedies is their intrinsic flexibility: they reflect the public's changing interests as advanced through their elected representatives. For example, New Jersey, the state in which Wendy Dressler worked and sued Lime Energy, has a state whistleblower statute which readily covers the alleged conduct at issue in this case and the *Dressler* case. New Jersey's Conscientious Employee Protection Act ("CEPA") provides:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following: [a] Discloses or threatens to disclose *to a supervisor* or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee . . . . or any governmental entity . . . ; or (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any

> shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental agency; . . .or [c] Objects to, or refuses to participate in any activity, policy, or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee . . . . or (2) is fraudulent or criminal, including any activity, policy, or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee . . .; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J. REV. STAT. § 34:19-3 (emphasis added).

As a remedial statute, New Jersey courts construe CEPA "liberally to effectuate its important social goal . . . to 'protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct.'" *Hitesman v. Bridgeway, Inc.*, 93 A.3d

306, 316 (N.J. 2012) (citations omitted). A plaintiff bringing a CEPA claim must demonstrate that "(1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a 'whistleblowing' activity described in N.J.S.A. 34:19-3(c); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistleblowing activity and the adverse employment action." *Battaglia v. United Parcel Serv., Inc.*, 70 A.3d 602, 625 (N.J. 2013) (citation omitted); *see also Hitesman*, 93 A.3d at 316 ("The statute thus shields an employee who objects to, or reports, employer conduct that the employee reasonably believes to contravene the legal and ethical standards that govern the employer's activities.").

Florida's whistleblower statute, the FWA, provides that "[a]n employer may not take any retaliatory personnel action against an employee because the employee has . . . [o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." FLA. STAT. § 448.102(3) (2013). As such, the FWA provides a cause of action to employees who are allegedly

wrongfully discharged based upon an employer's alleged retaliatory motive.

To establish a prima facie case of retaliation in violation of the FWA, a party must plead and prove that: (i) he or she engaged in statutorily protected expression; (ii) he or she suffered an adverse employment action; and (iii) the adverse employment action was causally linked to the statutorily protected expression. *See Sierminiski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000) (applying Title VII retaliation analysis to FWA claim); *see also Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1132-33 (Fla. 4th DCA 2003). To establish that he or she engaged in statutorily protected expression sufficient to prove a prima facie case of retaliatory discharge under the FWA, the party must plead and prove that he or she objected to or refused to participate in: "(i) an illegal activity, policy or practice of an employer, (ii) illegal activity of anyone acting within the legitimate scope of their employment, or (iii) illegal activity of an employee that has been ratified by the employer." *Pinder v. Bahamasair Holdings Ltd., Inc.*, 661 F. Supp. 2d 1348, 1351 (S.D. Fla. 2009) (citing *Sussan v. Nova Se. Univ.*, 723 So. 2d 933, 934 (Fla. 4th DCA 1999)).

The FWA has no administrative prerequisites to bringing a claim. As long as an employ-

ee has engaged in the protected activity enumerated in the statute, the employee is free to go straight into court. Remedies abound for those who allegedly "blow the whistle" on their employers.

Hawaii enacted similar coverage, also targeting the kind of conduct alleged in this case and in *Dressler* and *Duke*. The Hawaiian legislature passed the Whistleblower Protection Act, which provides that "[a]n employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because (1) the employee . . . reports or is about to report *to the employer*, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of (A) [a] law, rule, ordinance, or regulation . . . ." HAW. REV. STAT. § 378-62(1)(A) (emphasis added).

Minnesota's state whistleblower statute is one of the broadest, providing that "[a]n employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee . . . because (1) the employee . . . in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule pursuant to law *to an employer* or to any governmental body or law enforcement official . . . ." MINN. STAT. § 181.932(1) (emphasis added). Also, the employ-

ee is protected if "the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason." *Id.* § 181.932(4); *see also Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270, 274 (Minn. 2002) (concluding that the statute "clearly and unambiguously protects reports made of a violation of any federal or state law or rule adopted pursuant to law. It does not contain an explicit public policy requirement.") (citation omitted).

New Hampshire's statute also protects employees who, *inter alia*, "in good faith, report[] . . ., verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States"; or who "objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law." N.H. REV. STAT. ANN. § 275-E:2. In *Appeal of Bio Energy Corp.*, the New Hampshire Supreme Court made clear that the statute covered whistleblowers who only complained internally. 607 A.2d 606, 608 (N.H. 1992) ("Paragraph I of RSA

275-E:2 does not require that an employee report a potential violation of law to a third party. By its very terms, it covers reports *made either to employers* or to third parties.") (emphasis added).

Almost identical is language in Maine's Whistleblowers' Protection Act, which provides that "[n]o employer may discharge, threaten or otherwise discriminate against an employee . . . because: (A) The employee, acting in good faith, or a person acting on behalf of the employee, reports orally or in writing *to the employer* or a public body what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State, or the United States." ME. REV. STAT. ANN. tit. 26, § 833(1)(A) (emphasis added).

And the language of Oregon's statute amounts to the same thing: "It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee . . . for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation." OR. REV. STAT. § 659A.199(1); *see also Brunozzi v. Cable Commc'ns, Inc.*, 851 F.3d 990, 1000 (Or. 2017)

(holding that "the Oregon legislature intended the term 'reported' . . . to mean a report of information to *either an external or internal* authority.") (emphasis added). All of these statutes would cover the kind of conduct alleged by Respondent and by Dressler and Duke.

Legislators in Rhode Island tweaked the same language slightly in the Whistleblowers' Protection Act. The statute covers whistleblowers who complained internally, but adds the provisos: "unless the employee knows or has reason to know that the report is false. Provided, that if the report is verbally made, the employee must establish by clear and convincing evidence that the report was made." 28 R.I. GEN. LAWS § 28-50-3(4).

California legislators expanded their whistleblower statute, California Labor Code § 1102.5, so that after January 1, 2014, it no longer protected only those employees who complained to the government but also employees who complained internally. CAL. LAB. CODE § 1102.5(a), (b) (protecting those who "disclose[d] information to . . . *a person with authority over the employee*") (emphasis added).

Missouri recently passed and signed Senate Bill No. 43, the "Whistleblower's Protection Act," which took effect on August 28, 2017.

Those protected include employees who "report[] to his or her *employer* serious misconduct of the employer that violates a clear mandate of public policy as articulated in a constitutional provision, statute, or regulation promulgated under statute; or an employee of an employer who has refused to carry out a directive issued by his or her employer that if completed would be a violation of the law." Mo. SB 43 § 285.575 ¶ 2(4) (emphasis added).[3]

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[3] Most of these state statutes include a statute of limitations requiring actions to be brought within 1 to 3 years. *See, e.g.*, N. H. REV. STAT. ANN. 275-E:2(II) (3 years); *Ayala v. Frito Lay, Inc.*, No. 1:16-cv-01705, 2017 U.S. Dist. LEXIS 102350, at *44, 47 (E.D. Cal. June 30, 2017) (noting law is unclear as to whether 1-year or 3-year statute of limitations applies to actions brought under CAL. LAB. CODE § 1102.5, but applying 3-year statute of limitations); *Bicker v. City of Portland*, No. 3:16-cv-00215, 2016 U.S. Dist. LEXIS 91480, at *15 (D. Or. July 14, 2016) (applying 1-year statute of limitations to claims brought under Oregon whistleblower statutes); *Goddard v. APG Security-RI, LLC*, 134 A.3d 173, 178 (R.I. 2016) (3 years); *Frost v. Walmart DC*, No. 2:14-cv-84, 2015 U.S. Dist. LEXIS 24472, at *10 (D. Me. Feb. 28, 2015) (2 years). *But see Ford v. Minneapolis Pub. Sch.*, 874 N.W.2d 231, 232 (Minn. 2016) (6 years). The Dodd-Frank Act's lengthy six to ten-year statute of limitations stands out in bold relief against the state statutes' shorter filing deadlines (as well as those imposed by Sarbanes-

This list is illustrative rather than exhaustive. And all this is not to say that this approach is uniform. Still, even in those states that do not yet protect whistleblowers who complain internally, legislators are free to enact similar legislation if the public that voted them into office so desires.

Moreover, "the majority of states [have] carv[ed] out a public-policy exception to the general rule of at-will employment for wrongful-discharge claims." *Dorshkind v. Oak Park Place of Dubuque, II, L.L.C.*, 835 N.W.2d 293, 300 (Iowa 2013); *see also, e.g., Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980) (recognizing that an employer may terminate an at-will employee for any reason, or for no reason at all, so long as the employer's decision does not violate public policy). In some states, these common-law doctrines protect certain kinds of whistle-blowing employees. For example, in Texas, the Texas Supreme Court created a narrow public policy exception to the employment-at-will doctrine. *See Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (holding an employee may sue for wrongful termination if he is fired for the sole reason that he re-

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Oxley), once again illustrating the legislative effort to motivate complainants to report directly to the SEC.

fused to perform an illegal act); *see also Becker v. Cmty. Health Sys., Inc.*, 359 P.3d 746, 749 (Wash. 2015) (internal reporting case) (holding that to state a wrongful discharge claim, a plaintiff "must plead and prove that his or her termination was motivated by reasons that contravene an important mandate of public policy . . . [that] is clearly legislatively or judicially recognized . . . [including] where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.") (citations omitted). And in *Dorshkind*, the Iowa Supreme Court held that internal whistleblowing is a protected activity for purposes of establishing a wrongful-discharge claim. 835 N.W.2d at 306.

Dorshkind also noted "[o]ther jurisdictions have similarly identified internal whistleblowing as a protected activity for purposes of establishing wrongful-discharge claims." *Id.* at 306 n.4 (citing *Kearl v. Portgage Envtl., Inc.*, 205 P.3d 496, 500 (Colo. App. 2008); *Lanning v. Morris Mobile Meals, Inc.*, 720 N.E.2d 1128, 1130-31 (Ill. App. Ct. 1999); *Moyer v. Allen Freight Lines*, 885 P.2d 391, 395 (Kan. Ct. App. 1994); *Barker v. State Ins. Fund*, 40 P.3d 463, 468 (Okla. 2001)). The *Dorshkind* court also noted that "[o]nly the minority of courts refuse to protect an employee who makes an internal report." 835 N.W.2d at 306 n.4 (citing *Wholey v.*

Sears, Roebuck & Co., 803 A.2d 482, 496 (Md. 2002)). Other aspects highlighted by *Dorshkind* were the cases that "g[a]ve less credence to the difference between internal and external reports, focusing instead on the nature of the claim." 835 N.W. at 306 n.4 (citing *Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1998); *Thomas v. Med Ctr. Physicians, P.A.*, 61 P.3d 557, 565-66 (Idaho 2002); *Connelly v. State*, 26 P.3d 1246 (Kan. 2001)).

Some jurisdictions, like Minnesota and New Jersey, have *both* statutory remedies and wrongful discharge common-law remedies available to whistleblowers. *See, e.g., Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 453 (Minn. 2006) ("We hold . . . that the Minnesota Whistleblower Act does not preclude common-law wrongful-discharge claims [in violation of public policy] premised on *Phipps [v. Clark Oil & Refining Corp.]*, 408 N.W.2d 569 (Minn. 1987)."); *Pierce*, 417 A.2d at 512.

In sum, there is no shortage of remedies for those employees who complain internally but not to the SEC. Indeed, "the scope of legal avenues for the creative attorney of the discharged whistleblowing employee is quite expansive." Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Com-*

parative Legal, Ethical, and Pragmatic Analysis, 45 S. TEX. L. REV. 543, 608 (2004) (commenting that "[a]lthough a few jurisdictions appear very conservative regarding the 'public policy' doctrine, many are quite liberal, and ever-evolving, and thus afford the terminated whistleblowing employee, even the at-will employee, the excellent opportunity to use the public policy doctrine as a very viable vehicle for legal redress.").

Based on the ready availability of these alternate remedies, and as Petitioner has argued forcefully in its brief, there is no need to expand the Dodd-Frank definition of "whistleblower" beyond what the plain and unambiguous statutory language dictates. *See* Pet. Br. 13-14, 16-19; *see also Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013) ("Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision.") (citation omitted); *see generally United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself. . . . [I]t is also where the inquiry should end, for where, as

here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"). Under that plain language, an individual must complain to the SEC to qualify as a Dodd-Frank "whistleblower." Reversal of the decision below is warranted.

II. The Predicament Faced by Lime Energy and by Prestige Cruises (If the District Court's Dodd-Frank Holding Is Reversed) Illustrates the Burdens Placed on Employers by Judicial Deference to the SEC Regulation.

Both Lime Energy and Prestige Cruises (if the district court's Dodd-Frank holding is reversed) provide the Court with concrete examples of the burdens imposed by the decision below on national employers in light of judicial deference to the SEC's regulation (Rule 21F-2(b)(1)),[4] and how critically important it is that the issue be resolved so the Dodd-Frank Act is consistently applied in accordance with the plain, unambiguous language of the statute.

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[4] The district court below deferred to the SEC's regulation, Rule 21F-2(b)(1), which provides that a person who makes only an internal disclosure is a "whistleblower" under the anti-retaliation provision of the Dodd-Frank Act. Pet. App. 40a; Pet. Br. 10.

Lime Energy initially hired Wendy P. Dressler, plaintiff in *Dressler v. Lime Energy*, as an administrator of the public sector for New York projects, but she later held the position of accounting manager of the utilities division. No. 3:14-cv-07060, DE1, Compl. ¶¶ 3-9. She alleges she raised concerns internally about discrepancies in the company's accounts receivable but admittedly did not go to the SEC. *Id.* ¶¶ 15-17, 23-26, 30-38, 40. She further alleges she was terminated as a result. *Id.* ¶ 2.

On July 17, 2012, Lime Energy issued a press release advising that it had discovered misreporting that might require restatement of affected financial statements. *Id.* ¶ 44. On November 5, 2012, Dressler and other employees were terminated as the result of an internal investigation. *Id.* ¶ 47.

The District Court held that Dressler qualified as a "whistleblower" under the Dodd-Frank Act, holding that the whistleblower-protection provision of the Dodd-Frank Act is ambiguous under *Chevron* (while noting it was a close issue) and deferring to the SEC's regulation as "a reasonable and permissible construction of the Dodd-Frank Act's whistleblower protection provision." *Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *37-42 (D.N.J. Aug. 13, 2015). In doing so, the

District Court cited to the lower court's holding in *Digital Realty* as support for its ruling. *Id.* at 40-42. After Lime Energy's motion to dismiss was denied, the case entered an extensive discovery phase. The case has now been stayed pending this Court's decision.

Dressler was terminated on November 5, 2012, but she did not file her complaint with the District Court until November 10, 2014. Therefore, Dressler is the perfect example of a plaintiff who could have sued under the Sarbanes-Oxley Act, which provided another avenue of redress, but chose not to, and now seeks relief as a Dodd-Frank "whistleblower." The statute of limitations for the Sarbanes-Oxley Act is six months, *see* 18 U.S.C. § 1514A(b)(2)(D), so under that statute, while Dressler had every right to seek relief, she chose not to. Dressler's lawsuit under Sarbanes-Oxley is now time-barred. In marked contrast, the statute of limitations for the Dodd-Frank Act is between *six and ten years*. *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii). Because the District Court held that, despite failing to raise her concerns with the SEC, Dressler was a "whistleblower" under the Dodd-Frank Act, she was able to file her claim in federal court.

Moreover, the Dodd-Frank Act allowed her to bring a retaliation claim in the District

Court in the first instance, *see* 15 U.S.C. § 78u-6(h)(1)(B)(i), whereas the Sarbanes-Oxley Act would have required her to first exhaust her administrative remedies by filing a complaint with the Department of Labor, *see* 18 U.S.C. § 1514A(b)(1).[5] These differences between the statutes were part of a conscious strategy to award financial incentives and additional protections to complainants who adhered to Dodd-Frank procedures, including the requirement to directly report to the SEC, to increase the amount and caliber of the complaints made to the SEC.

Indeed, the principal purpose of the Dodd-Frank whistleblower provision, according to the SEC, was "to promote effective enforcement of the Federal securities laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the *Commission* . . . providing information to persons conducting an *internal investigation* may not . . . achieve the statutory purpose of getting high-quality, original information about

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[5] The Dodd-Frank Act also provides that whistleblowers can seek double back pay, *see* 15 U.S.C. § 78u-6(h)(1)(C), but they may not do so under the Sarbanes-Oxley Act, *see* 18 U.S.C. § 1514A(c).

securities violations directly into the hands of Commission staff." 76 Fed. Reg. 34,308 (emphases added); *see also* 156 CONG. REC. S5929 (daily ed. July 15, 2010) (statement of Sen. Chris Dodd) ("The Congress intends that the SEC make *awards that are sufficiently robust* to motivate potential whistleblowers to share their information and to overcome the fear of risk of the loss of their positions. Unless the whistleblowers come forward, the Federal Government will not know about the frauds and misconduct.") (emphases added). In contrast with the Sarbanes-Oxley Act, which provides that internal reports are sufficient, the Dodd-Frank Act's expressed purpose of encouraging whistleblowers to share information with the SEC justifies the longer statute of limitations and ability to file directly in district court.

Dressler's lawsuit was salvaged by the District Court's finding that she was a Dodd-Frank Act "whistleblower," placing the viability of her claim squarely within the ambit of the question presented by Digital's petition. Her case illustrates the dramatic expansion accomplished by the decision below, which flouted the presence of unambiguous, clear statutory language.

The district court in *Duke* reached the opposite conclusion as the district court in *Dress-*

ler—recognizing that under the plain, unambiguous language of Dodd-Frank, an individual is considered a "whistleblower" protected by the statute against retaliation only if he or she first reports securities law violations to the SEC. Because it was undisputed that Duke never reported any alleged violations to the SEC, he is not a "whistleblower" under Dodd-Frank, and thus has no private cause of action under that statute against Prestige Cruises and the other defendants for alleged retaliation. If the Eleventh Circuit reverses the district court's decision in *Duke* on the Dodd-Frank issue, then Prestige Cruises will again face the burden placed on it at the beginning of the case and the burden placed on Lime Energy in *Dressler*.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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